No. 10382

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LETTIE LEE, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

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This reply brief is filed in answer to several contentions made in respondent's brief which were not anticipated or fully met in the Board's main brief.

1. Respondent contends (Resp.'s brief, pp. 9–10) that "a unit consisting of the cutters, slopers and trimmers cannot be the appropriate unit" because, it asserts, slopers and trimmers are not eligible to membership in the Union. But the Board specifically found (R. 72) upon ample evidence (R. 344–345, 394–405, 451, 466, 491–493), as had the trial examiner (B. A. 35), and as *respondent had contended* before the Board (Brief to Board, pp. 2–4; Exceptions to examiner's intermediate report (R. 50, par. 5a)), that the three female employees of respondent who are styled slopers and trimmers "have been doing the same kind of work" as respondent's employees who

are styled cutters, and that they are in fact "qualified cutters."[1] As such, they are of course eligible to membership in the Union (R. 212–213, 230–231). Moreover, in view of respondent's position before the Board, it may not now be heard to oppose the Board's findings in this regard. Section 10 (e) of the Act; *Marshall Field & Co.* v. *N. L. R. B.,* 63 S. Ct. 585.

2. Respondent also contends (Resp.'s brief, pp. 11–12, 18–21) that the Board's finding as to the appropriate unit in the instant case is inconsistent with several cited prior Board decisions. But the statute clearly requires that the Board determine the appropriate unit in light of the circumstances "in each case" (Section 9 (b); see also H. Rep. 1147, 74th Cong., 1st Sess., p. 22, wherein it is stated that designation of the appropriate unit is "obviously one for determination in each individual case"). Here, the record shows that cutters constitute a well-recognized craft in the garment industry and are organized and engage in collective bargaining through separate locals;[2] that they are the only clearly defined group of

[1] The Union, which had argued to the contrary before the examiner, filed no exceptions to his finding (R. 72).

[2] While it appears that where all of the employees of a garment manufacturer in the Los Angeles area are organized, bargaining in their behalf is customarily carried on by a Joint Board of the Union composed of representatives of cutters, operators, pressers, and cloak operator locals, where only the cutters are organized the record shows that representatives of the cutters engage in collective bargaining independently and without regard to the Joint Board arrangement (R. 201–203, 208–210). Moreover, the cutter's local entered into the Joint Board arrangement only upon condition that it be permitted to retain its autonomy, elect its own bargaining representatives, and attend to its own bargaining (R. 222–223).

respondent's employees who have sought to exercise bargaining rights; that the Union is not seeking to represent any other employees than cutters; and that no other production employees of respondent apparently desire representation by the Union (Board's main brief, pp. 9–10). Considerations such as these have been repeatedly held to constitute proper bases for a unit determination (*id.*). In these circumstances it may not be said that the Board's unit determination is arbitrary or capricious.[3]

3. Respondent contends further (Resp.'s brief, p. 13) that, despite the facts set forth in the Board's main brief with respect to respondent's refusal to bargain (Board's main brief, pp. 5–7), the Board nevertheless erred in concluding that respondent had violated Section 8 (5) of the Act. Respondent's contention in this regard rests upon the basis that the unit which the Board found in its decision to be the appropriate unit was not identical in all respects with the unit which the Union claimed to be appropriate, in that the appropriate unit as found by the Board included respondent's employees designated as slopers and trimmers. But the evidence reviewed in the Board's main brief (pp. 5–7) demonstrates beyond

[3] The Board has also recently held cutters to constitute a separate appropriate unit in other cases. E. g., *Matter of Crescent Dress Co.*, 29 N. L. R. B. 351; *Matter of Ulman, Inc.*, 45 N. L. R. B. 836. In giving weight to the extent of organization among the employees in making its unit finding, the Board applied a factor which it has stressed since 1937 as an important consideration in effectuating the policies of the Act. *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115; *Matter of Gulf Oil Corp.*, 4 N. L. R. B. 133, 137. See also *Matter of Swift & Co.*, 42 N. L. R. B. 1184; *Matter of Pacific Gas & Electric Co.*, 44 N. L. R. B. 665.

cavil that in refusing to bargain with the Union respondent was not motivated by any doubt as to the appropriate unit, but by a flat rejection of the collective bargaining principle. As the Board pointed out (R. 76, note 15), respondent's conduct "precluded any discussion of the unit" and in effect constituted a refusal "to bargain with the Union for employees in any unit." It is clear that the Union did in fact represent a majority of the employees in the appropriate unit found by the Board (Board's main brief, p. 11). In these circumstances, as is well settled, respondent may not excuse its flagrant refusal to bargain collectively by recourse to spurious doubts, which did not exist, as to the appropriate unit. See e. g. the *Biles Coleman* and the *National Motor Bearing* cases, cited at p. 14 of our main brief; see also *N. L. R. B.* v. *Clinton E. Hobbs Co.,* 132 F. (2d) 249, 251 (C. C. A. 1); *N. L. R. B.* v. *Federbush Co.,* 121 F. (2d) 954, 956 (C. C. A. 2). Cf. *N. L. R. B.* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 868–869 (C. C. A. 2).

4. Respondent further contends (Resp.'s brief, pp. 23–26) that the Board improperly ordered it to reinstate employee Joe Sardo, who had been previously convicted of a felony. This contention is manifestly untenable in the circumstances of this case. Assuming, *arguendo,* that respondent would have been justified in refusing to reinstate Sardo for this reason, it is clear from the evidence reviewed in the Board's main brief (pp. 16–17), as the Board found (R. 80), that Sardo's criminal record did not in fact motivate respondent's refusal to reinstate the employee, but that respondent's refusal was in fact based upon his union activities.

Nor does it appear that respondent has any rule against the employment of persons with criminal records (Cf. *Eagle Picher Mining and Smelting Co.* v. *N. L. R. B.*, 119 F. (2d) 903, 915 (C. C. A. 8). No valid reason appears why Sardo's offense, resurrected from a buried past,[4] should suspend the application of the normal remedy of reinstatement to correct respondent's illegal conduct against him. "Rehabilitation of past offenders finds sanction both in law and in common practice." *N. L. R. B.* v. *Gamble Robinson Co.*, 129 F. (2d) 588, 592 (C. C. A. 8). See also *N. L. R. B.* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 195 (C. C. A. 9); *N. L. R. B.* v. *J. G. Boswell Co.*, 12 L. R. R. 655, 660 (C. C. A. 9).

5. Respondent also laboriously seeks to disprove in its brief (pp. 34–35) a Board "contention" that respondent's "granting of a wage increase * * * was an unfair labor practice." But the Board made no such finding. Nor is there any such contention in the Board's main brief. On the contrary, it is clear from a reading of the Board's decision and its brief that the increase in wages is merely referred to as a part of the totality of respondent's conduct (R. 61–63; Board's main brief, pp. 4, 5, 13 (note)).

6. Respondent asserts (Resp.'s brief 39–41) that its oral statements, found by the Board to be unfair labor practices, constituted merely expressions of "opinion," and that the Board's findings of unfair labor practices, insofar as based upon such statements, violate respondent's "right of free speech." But the unambiguous

[4] Sardo's conviction occurred in 1936 (R. 630).

statements of hostility to the Union, made by respondent's supervisory personnel to men "who know the consequences of incurring the employer's strong displeasure" (*International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78); respondent's threats to close its plant in the event of unionization; its emphasis upon alleged disadvantages which membership in the Union would entail; and its questioning of prospective employees concerning union affiliation (See Board's main brief, pp. 4, 5, 7, 8, 9, note 8, p. 13), may not conceivably be regarded as merely expressions of opinion. Moreover, "Even expressions of opinion of such a nature as to intimidate and coerce employees * * * violate the Act." *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1007–1008 (C. C. A. 9). (See also cases cited, note 8, p. 13, of Board's main brief).

7. Finally, respondent contends that the Board's petition to enforce its order should be denied because the petition fails to allege that respondent has not complied with the order (Resp.'s brief, pp. 41–42). But it is firmly established that such an allegation is not a condition precedent to an enforcement decree. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *N. L. R. B.* v. *Gerling Furniture Company, Inc.*, 103 F. (2d) 663 (C. C. A. 7); *N. L. R. B.* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 194 (C. C. A. 9); *N. L. R. B.* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. C. A. 9); *N. L. R. B.* v. *L. H. Hamel Leather Co.*, 135 F. (2d) 71, 72–73 (C. C. A. 1); *N. L. R. B.* v. *Burke Machine Tool Co.*, 133 F. (2d) 618, 621 (C. C. A. 6); *N. L. R. B.* v. *Clinton E. Hobbs*

Co., 132 F. (2d) 249, 251–252 (C. C. A. 1). Indeed, *N. L. R. B.* v. *Friedman-Harry Marks Clothing Co.,* 83 F. (2d) 731 (C. C. A. 2), upon which respondent relies, was subsequently reversed by the Supreme Court (301 U. S. 58). Accordingly, that case, too, is authority against respondent's contention. Nor does *N. L. R. B.* v. *LaSalle Hat Co.,* 105 F. (2d) 709 (C. C. A. 3) help respondent; the Board's order in that case was denied enforcement on wholly unrelated grounds, as the opinion in that case plainly discloses.

CONCLUSION

It is respectfully submitted that the Board's order is valid and proper in all respects, and that a decree should issue affirming and enforcing said order in full as prayed in the Board's petition to enforce.

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AUGUST 1943.

APPENDIX

The relevant portions of the National Labor Relations Act are as follows:

SEC. 9 * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

SEC. 10 * * *

(e) * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

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